No. 15,019

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES MEREDITH,

Appellant,

vs.

RICHARD MEREDITH SCRUGGS, CAROL ELIZABETH SCRUGGS, ATLEE GAIL SCRUGGS, MERI-JO ABRAMS and LOUIS EDMUND ABRAMS,

Appellees.

Upon Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR JAMES MEREDITH, APPELLANT.

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Subject Index

Table of Authorities Cited

Statutes

Texts

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JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court was based upon Title 28 U.S.C. Section 1331. The jurisdiction of this Court is founded on Title 28 U.S.C. Section 1291.

The judgment below was entered December 16, 1955 (R. 20). A motion for new trial was filed December 27, 1955, and denied on January 6, 1956 (R. 22, 23). Notice of Appeal was filed January 6, 1956 (R. 24).

STATEMENT OF THE CASE.

The complaint of Appellees (five minors) claimed damages allegedly sustained when their mother was injured in an automobile accident. It alleges damages for loss of "support, maintenance, education, nurture, care and training", and for partial loss of "the association, care, attention, acts of kindness, comfort and solace" of their mother's society (R. 5). Appellant moved to dismiss this complaint (R. 6) which motion was denied (R. 8) and Appellant answered (R. 7). The mother also brought suit for her damages arising out of the same accident and that suit was consolidated with this one for trial (R. 27). The jury returned verdicts in favor of the mother for $40,000.00 and for the Appellees as follows:

Atlee Gail Scruggs, Meri-Jo Abrams, and Louis Edmund Abrams each recovered $3,000.00 and Richard Scruggs and Carol Elizabeth Scruggs each recovered $500.00 (R. 17-19). Judgment in the amount set forth was entered on December 16, 1955 (R. 20, 21). A motion for new trial was filed December 27, 1955 (R. 22, 23), and denied on January 6, 1956 (R. 23). Notice of Appeal was filed January 6, 1956 (R. 24).

SPECIFICATIONS OF ERROR.

(1) The Court below erred in overruling Appellant's motion to dismiss since the complaint failed to state a claim upon which relief could be granted.

(2) The Court below erred in entering judgment for the Appellees and against Appellant since the

complaint failed to state a claim upon which relief could be granted.

(3) The Court below erred in overruling the motion to dismiss and in granting judgment for the Appellees against the Appellant in that minor children have no claim for relief based upon the loss of support, maintenance, education, nurture, care and training or association, care, attention, acts of kindness, comfort and solace and society of a parent injured where a parent survives the injury.

SUMMARY OF ARGUMENT.

Minor children have no claim for damage for the interruption of the parent and child relationship resulting from a non-fatal injury to a parent. The existence of such a cause of action has been steadfastly denied by American and English decisions. It is not founded upon Hawaiian statutes nor Hawaiian judicial precedent. The judicial creation of such a novel claim for relief would have far reaching consequences in the law of torts e.g., upsetting settlements entered into in good faith, a multiplication of actions where one existed before and the imposition of obstacles to the settlement of personal injury claims. If a lacuna in the common law exists, it should be filled by the Hawaiian Legislature rather than by the federal courts.

ARGUMENT.

(1) THE COMMON LAW AS DECIDED BY ENGLISH AND AMERICAN DECISIONS DOES NOT RECOGNIZE THE CLAIM HERE ASSERTED.

A. The Direct Authorities.

As far as we are able to ascertain only three previous cases directly involving the point here at issue have been decided.

The first is *Hill v. Sibley Memorial Hospital,* 108 F. Supp. 739 (D.C. 1952). In that case the Court said:

> Courts should ever be alert to widen the circle of justice to conform to the changing needs and conditions of society. At the same time a lower Court should be cautious in laying down a completely new rule in the light of prior holdings of our Court of Appeals indicating hesitancy to extend the right of recovery of damages for such loss to a child. If there is to be any change in that doctrine this Court does not feel that it should be the one to initiate it.

Another case is *Jeune v. Del E. Webb Const. Co.,* 77 Ariz. 226, 269 P. 2d 723 (1954). In that case the court denied that either a wife or child had a right of action for damages arising out of the loss of the comfort and society of the husband and father. It stated:

> Concerning the right of a minor child to separately sue for its damages resulting from personal injuries to the father, the plaintiffs refer us to no case that has ever authorized such an action. There is much theorizing that such should be the law but nothing to show us it ever has been the law . . . We are not aware of any jurisdiction that has ever authorized such an action and be-

> lieve there are none. The reason probably is that never before was it attempted. The cause of action for personal injury to the father rests with him for all the resulting damage. It never has been the law that multiple actions could be brought by each member of the family for a negligent injury sustained by the father. It is unnecessary to discuss other reasons urged by appellee as a basis for sustaining the action of the trial court. (p. 724)

Earlier in *Eschenbach v. Benjamin,* 195 Minn. 378, 263 N. W. 154 (1935), the Minnesota court had denied the existence of such a cause of action, and pointing to the practical reasons why the courts have not recognized it, stated:

> Were we to sustain plaintiffs' contentions it is obvious that each minor child would have a distinct and separate cause of action. In the instant case, instead of having one cause by the husband alone, there would also be a cause of action by the wife and one for each minor child. If this rule were to be extended as plaintiffs would have us do, then, carried to its logical conclusion, there would, in many accident cases, be litigation almost without end, all based upon a single tort and only one individual physically involved in the accident itself. (pp. 155-6)

There are, in addition, several discussions of the question by way of dicta. In *Stout v. Kansas City Terminal Railway Co.,* 172 Mo. App. 113, 157 S. W. 1019 (1913), the court said:

> The entire damage in cases of negligent injury to a husband or father has always been consid-

ered as centering in him and his right in the premises has always been thought to be exclusive; and a settlement with him has always been recognized as closing the incident. No case has been found to support a different conception of the rights of the parties. Any other view would lead to absurd results. (p. 1021)

In *Blair v. Seitner Dry Goods Co.,* 184 Mich. 304, 151 N. W. 724 (1915), the court said:

If a husband is injured and recovers his damages, his wife cannot usually recover damages. The husband has usually, as a result of his action, been compensated for his pain and suffering, past and future, for loss of time, for diminution of capacity to earn money. The minor children of an injured father and those of an injured mother may suffer on account of the injury, but it has never been considered that they had an action therefor. (p. 727)

In *Feneff v. New York Cent. & H. R. R. Co.,* 203 Mass. 278, 89 N. E. 436 (1909), it was stated:

The minor children of an injured father who is legally bound to furnish them with support may suffer indirectly from his injury. So too may his wife, to whom he owes the same legal duty to furnish support; yet it was never held that a wife or minor child could recover for the consequences of a father's disability, against one who had negligently injured him. The diminished value of the husband's consortium with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is sup-

> posed to have made full pecuniary compensation to the husband and father for his injury. In the benefit from this payment the wife and children may be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential. (p. 437)

It is thus obvious that the courts applying common law, in dealing directly with the claim for relief here sought to be asserted, have unanimously rejected that cause.

B. The Arguments by Way of Analogy.

The Court below purported to rely by way of analogy upon the decisions in *Hitaffer v. Argonne Co.,* 183 F. 2d 811 (C.A.D.C. 1950), and *Daily v. Parker,* 152 F. 2d 174 (7th Cir. 1945). In the *Hitaffer* case, a wife sought to recover damages for loss of consortium arising out of the alleged negligent injury of her husband by his employer. The Court of Appeals ruled:

> (1) That a wife could bring an action for damages arising out of the negligent injury of her husband, and
>
> (2) That the exclusive remedy provision of the Longshoremen and Harbor Workers Compensation Act did not prevent the suit.

In that case, the Court of Appeals recognized that the common law did not permit a wife to sue for damages arising out of the negligent injury of her husband. As it pointed out, only one case had ever sustained such a claim for relief. *Hipp v. E. I. Dupont de Nemours & Co.,* 182 N. C. 9, 108 S. E. 318

(1921), and that case had been effectively overruled, in the later case of *Hinnant v. Tide Water Power Co.,* 189 N. C. 120, 126 S. E. 307 (1925). However, the Court of Appeals rejected the decided cases and upheld the claim for relief. Since then, however, the *Hitaffer* case would appear to have been, in effect, overruled by *Brown v. Curtin & Johnson, Inc.,* 221 F. 2d 106 (C.A.D.C. 1955), where the court held that a wife had no right of action for loss of consortium or other injury on account of the death of her husband by wrongful act. Moreover, while the *Hitaffer* case was followed in *Brown v. Georgia-Tennessee Coaches, Inc.,* 88 Ga. App. 519, 77 S. E. 2d 24 (1953), and *Cooney v. Moomaw,* 109 F. Supp. 448 (D.C. Neb. 1953), it has been rejected in every other jurisdiction which has had occasion to pass upon the problem.

Coastal Tank Lines, Inc. v. Canoles, 207 Md. 37, 113 A. 2d 82 (1955);

Garrett v. Reno Oil Company, 271 S. W. 2d 764 (Tex. Civ. App. 1954);

Ripley v. Ewell, 61 S. 2d 420 (Fla. 1952);

Franzen v. Zimmerman, 127 Colo. 381, 256 P. 2d 897 (1953);

La Eace v. Cincinnati, Newport & Covington Ry. Co. Inc., 249 S. W. 2d 534 (Ky. 1952);

Larocca v. American Chain & Cable Co., 23 N. J. Super. 195, 92 A. 2d 811 (1952);

Nelson v. Lockett & Co., 206 Okla. 334, 243 P. 2d 719 (1952);

Ash v. Mullen, Inc., 43 Wash. 2d 345, 261 P. 2d 118 (1953);

Werthan Bag Corp. v. Agnew, 202 F. 2d 119 (C.A. 1953);

O'Neil v. United States, 202 F. 2d 366 (C.A. D.C. 1953);

Cook v. Snyder, 119 N. Y. S. 2d 481 (1953);

Best v. Samuel Fox & Co., (1952) A. C. 716.

See, also:

3 *Restatement, Torts,* Sec. 695.

Of course, even if the *Hitaffer* case represented the common law, it would not be controlling here, for that case is based upon the wife's right to the consortium of her husband. A child has no such right. Under the Hawaiian statutes on divorce, *Chapter 296, R.L.H. 1945,* as construed by the Supreme Court of Hawaii, a wife has a legal right to the love, affection, and physical presence of her husband. He cannot, without reasonable cause, absent himself and live apart from her. *Kaikona v. Kaikona,* 36 Hawaii 49 (1942). These principles, of course, are not unique in Hawaii, but are universally recognized in American and English jurisdictions.

On the other hand, while parents are under a duty to provide for their children pursuant to Sec. *12264, R.L.H. 1945,* nothing in the statutes or in the Hawaiian common law requires a parent to love a child or even to furnish personal guidance or education. Many parents, for example, find it for the best interests of their children to place them in boarding schools or other institutions far from the home of their parents, and the law recognizes the right of the parents to do this.

In *Daily v. Parker,* 152 F. 2d 174 (7th Cir. 1945), the Court of Appeals for the Seventh Circuit held that a child had a right of action against a person enticing its parent away from the home. While this case was followed in *Johnson v. Luhman,* 330 Ill. App. 598, 71 N. E. 2d 810 (1947); *Russick v. Hicks,* 85 F. Supp. 281 (D.C. Mich. 1949), and *Miller v. Monsen,* 228 Minn. 400, 37 N. W. 2d 543 (1949), it does not represent the common law. Every other court passing upon the problem since the *Daily* case has refused to adhere to the rule there laid down.

Edler v. MacAlpine-Downie, 180 F. 2d 385 (C.A.D.C. 1950);

Nelson v. Richwagen, 326 Mass. 485, 95 N. E. 2d 545 (1950);

Taylor v. Keefe, 134 Conn. 156, 56 A. 2d 768 (1947);

Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P. 2d 984 (1948);

Kleinow v. Ameika, 19 N. J. Super. 165, 88 A. 2d 31 (1952);

Henson v. Thomas, 231 N. C. 173, 56 S. E. 2d 432 (1949);

Garza v. Garza, 209 S. W. 2d 1012 (Tex. Civ. App. 1948);

Scholberg v. Intyre, 264 Wis. 211, 58 N.W. 2d 698 (1953);

Katz v. Katz, 95 N. Y. S. 2d 863 (1950).

See also 20 Mo. L. Rev. 107 where an excellent article dealing with *Hitaffer* and *Daily* as well as the type of claim here involved appears.

Not only is the *Daily* rule contrary to the common law, but it is clearly distinguishable from the principle involved in this case. Removing a parent from the home is a deliberate and direct interference with the parent-child relationship. On the other hand, where the parent is injured by the negligence of the third party, the interference is consequential and not deliberate. Neither of the analogies relied on by the court below represents the common law or is, on analysis, analogous.

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(2) THE COURT BELOW ERRED IN FAILING TO FOLLOW THE COMMON LAW AS REQUIRED BY HAWAIIAN STATUTE.

Sec. 1, R.L.H. 1945, provides in part:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii . . .

As we have seen, the common law did not recognize the existence of the claim for relief which the District Court upheld. While it is true that this statute does not confine the Hawaiian courts to a fixed set of precedents but allows a degree of flexibility to meet changes in the common law as they develop, *Vierra v. Campbell & Moody,* 40 Hawaii 86 (1953); *Welsh v. Campbell,* 41 Hawaii 106 (1955), nevertheless, where, as here, there is a unanimity of judicial authority opposing the claim sought to be asserted and, where no Hawaiian statute or judicial precedent upholds such claim, then the Hawaiian courts do not ignore the command of the statute, but apply the common law.

A case in point is *Hall v. Kennedy,* 27 Hawaii 626 (1923). In that case, the dependent parents of an adult child sought damages for loss of support arising out of the death of the child in an accident. The court stated:

> An action to recover damages for the death of a relative was not known to the common law . . .

The court went on to point out that in 1892 the Territory, then a kindom, had enacted what is now Sec. 1, R.L.H. 1945. The court stated:

> The rule of the common law applicable to the question involved herein, not having been altered by the Constitution or laws of the United States or (until the enactment of Act 245, S.L. 1923) by the laws of this Territory, must therefore be our guide in the instant case unless it can be said that a contrary rule of law has been "fixed by Hawaiian judicial precedent, or established by Hawaiian usage".

The court pointed out that in 1860 in the case of *Kake v. Horton,* 2 Hawaii 209 (1860), it had allowed a widow to recover damages for the wrongful death of her husband under Section 14 of the Civil Code 1859 which permitted judges to apply "necessary remedies to evils not specifically contemplated by law". That provision had been repealed by Act 57, S. L. 1892, which instead, by what is now Section 1, R.L.H. 1945, adopted the common law. The court then referred to *Ferreira v. Hon. R. T. & L. Co.,* 16 Hawaii 615 (1905), which had followed the *Kake* decision, and said:

> The cases of Kake v. Horton and Ferreira v. Hon. R. T. & L. Co. above cited are undoubtedly authority for the proposition that, as "fixed by Hawaiian judicial precedent" the common law rule denying a right of action to a widow for the wrongful death of her husband or a right of action to a father for the wrongful death of his minor son, has been abrogated in this jurisdiction. But, in conceding that the cases cited go to such lengths, it does not follow that, in the case of the death of an adult, a person dependent upon the deceased, even if such dependent be the father or mother of deceased, has, in the absence of statute, a right of action against the person causing the death of deceased. In Kake v. Horton the court, owing to the statute then in vogue, doubtless was authorized in allowing the widow to maintain her action for, in addition to the power vested in the court by that broad statute, a husband is bound by law to support his wife, and the legal right of the wife for such support was infringed by the wrongful act of the defendant. The same may be said of the Ferreira case for, since by law a father is entitled to the earnings of his son during the son's minority, a right of action may be maintained by the father against one who, by causing the son's death, deprives the the father of that legal right. Where, however, no legal right is infringed, no right of action may be maintained.

It is obvious from the decision in *Hall v. Kennedy,* supra, and from the subsequent death cases in Hawaii such as *Gabriel v. Margah,* 37 Hawaii 571 (1947), and *Young v. H. C. & D. Co.,* 34 Hawaii 426 (1938), that

the Hawaiian departure from the common law in *Kake v. Horton,* 2 Hawaii 209 (1860), was confined to cases involving wrongful death where the party suing could claim damage directly resulting from the deprivation of some legal relationship. After the adoption of the common law, the Hawaiian courts refused to broaden the *Kake* rule to include other classes of cases.

Moreover, it is apparent from the language in the opinion in the *Kake* case itself that, had it not been a case where the death of the husband had resulted from the injury, an action would not have been allowed, for the court said:

> We are of the opinion that much of the law read by the learned counsel for defendant, as well as a great part of their argument, is inapplicable to the question at issue.
>
> *They treat the case as if this was an action of trespass brought by the plaintiff to recover damages for an assault and battery,* committed on her deceased husband, Charlie Pihaole; whereas, as as we understand the matter, *it is an entirely different thing, being an action on the case, to recover for consequential damage resulting to the plaintiff by reason of the death of her late husband,* which she alleges to have been caused by the wrongful act of the defendant, Horton. (Italics supplied) (p. 210)

From time to time, the Hawaiian Legislature has broadened the remedies allowed in wrongful death cases. Thus, as pointed out in *Hall v. Kennedy,* 27 Hawaii 626 (1923), a statute had been enacted, by the time that case was decided in the Supreme Court,

which allowed actual dependents to recover in death cases. This statute is now Section 10486 R.L.H. 1945. Act 205, S. L. 1955, effective May 27, 1955, extended the damage recoverable in a statutory death action to include pecuniary injury by reason of losses in the nature of those sought in the present case. No attempt, however, was made in the statute to allow recovery of damages for such losses in cases where death did not result from the injury.

The Court below also stated:

> The foregoing review indicates very clearly that Hawaii intends to protect all legal interests of the family. (R. 15, 16)

However, a review of the Hawaiian cases cited by the Court below, *Kake v. Horton,* 2 Hawaii 209 (1860); *Ferreira v. Hon. R. T. & L. Co.,* 16 Hawaii 615 (1905); *Hall v. Kennedy,* supra; *Globe Indemnity Co. v. Araki,* 32 Hawaii 153 (1931); *Young v. H. C. & D. Co.,* 34 Hawaii 426 (1938); *Gabriel v. Margah,* 37 Hawaii 571 (1947); *Ginoza v. Takai Elec. Co.,* 40 Hawaii 691 (1955), and *Enos v. Hono. Motor Coach Co.,* 34 Hawaii 5 (1936), does not show any disposition on the part of the Hawaiian court to extend the principle adopted in the *Kake* case beyond the limitations previously set forth. On the contrary, the decision in *Hall v. Kennedy,* supra, expressly holds that in obedience to Section 1, R.L.H. 1945, that principle would not be so extended.

A review of the Hawaiian statutes cited by the court below, Act. 245 S.L. 1923 (now Section 10486, R.L.H. 1945), Act 206, S.L.H. 1953 (providing for

the survival of tort actions), Act 205, S.L.H. 1955 (allowing recovery of damages in a statutory death action to the same extent as to recovery allowed under *Kake v. Horton,* supra), does not reveal that any of those statutes can be construed so as to allow the claim here sought to be asserted. On the contrary, they all deal with situations involving the death of the person injured in the accident.

Thus, just as in *Hall,* supra, we have a situation where the common law does not recognize a right to relief and where neither Hawaiian judicial precedent nor statutes can be construed to uphold such a right. It is therefore clear that the substantive law of Hawaii will deny the claim for relief here asserted. A very similar case was that decided by the Florida court in *Ripley v. Ewell,* 61 S. 2d 420 (Fla. 1952), where a wife sought to recover for damages arising out of negligent injury to her husband, although the husband did not die as a result of the accident. Florida had a statute similar to Hawaii's Section 1, and the Florida court finding that the claim for relief was not accepted at the common law, refused to allow it in Florida.

Not only is the decision below contrary to Section 1, R.L.H. 1945, but the reasons asserted in the opinion of the lower court as the logical basis for its departure from common law will not withstand analysis.

The court below held, reasoning by analogy from *Hitaffer,* that a child should be allowed to recover since where a parent is negligently injured, because the child does suffer by deprivation of the care, com-

fort and companionship of its parent. Apparently, both the decision below and that in *Hitaffer* were based implicitly, as was *Daily* expressly upon the doctrine *ubi jus ibi remedium*. The difficulty is that that doctrine is inapplicable, for *jus* means a legal right, and as previously pointed out, a child has no legal right, under Section 12264, R.L.H. 1945 to the personal care, comfort and companionship of a parent. It is true that the complaint here contained allegations of loss of support, but any loss of support is, of course, only a consequence of injury to the parent and, since the parent can, and here did (R. 20, 21), recover for all the injuries which he or she has suffered, the allegations of loss of support do not make the claim for relief a good one. *Blair v. Seitner Dry Goods,* 184 Mich. 304, 151 N. W. 724 (1915); *Feneff v. New York Cent. & H. R. R. Co.,* 203 Mass. 278, 89 N. E. 436 (1909).

The loss by a child of the parent's care, comfort and companionship is no different whether the child is a minor or of age. An equally great loss may be sustained by a grandchild, a nephew, a more distant relative, a close personal friend, or, in Hawaii, a keiki hanai (a foster child, not legally adopted), all depending upon the circumstances of the case.

No logical distinction can be made between the case of the child and that of another to whom the injured person merely stood in point of fact *in loco parentis.* Of course, it can be argued that in one case there is a legal parent-child relationship, while in the other there is not. However, to attempt to draw a line

because of the parent-child relationship between a child and a grandchild living in the home of its grandparents, or a keiki hanai or even an old friend deprived of the daily companionship of the injured person, is merely to create a new legal fiction.

Aside from the fact that the decision below is contrary to the common law, to the Hawaiian judicial precedents and statutes, and is without logical justification, consideration should also be given to the practical consequences of that decision. If the claims for relief here sought were recognized, every settlement of a tort claim where the injury arose within the last twenty-two years and nine months (Sections 10427, 10430, 12261, R.L.H. 1945) would now be in doubt, for if the settlement were made only with the person injured, others, including minor children within two years after their majority, might come in and prosecute actions on their own behalf. In the future, no such claim could be settled without securing a release from the spouse and from the guardian of all the children. This would mean that in every case where a tort claimant was a parent and had minor children the claimant would have to have a guardian ad litem appointed for his children and meet the approval of the court before his case could be settled. The resulting burden upon the courts and the discomfiture of the tort claimants themselves would be, to say the least, substantial.

CONCLUSION.

For the reasons set forth above, the judgment below should be reversed.

Dated, Honolulu, Hawaii,
April 11, 1956.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

COMMON LAW, STATUTES AND DEPOSITORIES.

Sec. 1, R.L.H. 1945.

Common law applies except when. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *provided,* however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory.

Limitation of Actions

Personal Actions.

Sec. 10427, R.L.H. 1945.

Damage to persons or property. Actions for the recovery of compensation for damages or injury to persons or property must be instituted within two years after the cause of action accrued, and not after.

Tort Actions

Parties: Death by Wrongful Act.

Sec. 10486, R.L.H. 1945.

Action by dependent, when. When the death of a person is caused by the wrongful act or neglect of

another, any person who was wholly or partly dependent upon such decedent may maintain an action for damages against the person causing the death, or if such person so liable was then employed by another person who is responsible for his conduct, then also against such employer. Where there is more than one person wholly or partly dependent upon such decedent, any action that may be brought shall be brought by all of such dependents or by one or more of such dependents for the benefit of all the dependents, but only one action may be brought and one recovery had. In every action under this section such damages may be given as under all the circumstances may be just and the trial court shall apportion the damages given among all the dependents. In the action the court shall cause notice to be given of the pendency thereof to all known dependents who have not joined therein. Such action must be commenced within two years after the injury which caused the death; *provided,* however, that nothing in this section shall be construed as authorizing any action to be maintained hereunder against the employer of such decedent in any case where any dependent of the decedent has a remedy for compensation under the provisions of Chapter 77.

Children.

Sec. 12261, R.L.H. 1945.

Age of majority. All persons, whether male or female, residing in the Territory, who shall have attained the age of twenty years, shall be regarded as of legal age and their period of minority to have ceased.

Sec. 12264, R.L.H. 1945.

Parents' control and duties; binding out of children by judge. Parents, or, in case they be both dead, guardians, legally appointed, shall have control over the actions, the conduct and the education of their children during their minority; they shall have the right, at all times, to recover possession of their children by habeas corpus, and to chastise them moderately for their good; and it shall be the duty of all parents and guardians to set a good example before their children; to provide, to the best of their ability, for their support and education; to see that they are instructed in a knowledge of religion; to use their best endeavors to keep them from idleness and vice of all kinds; and to inculcate upon them habits of industry, economy and loyalty; and it shall be lawful for any judge of any circuit court, on a complaint being laid before him against any parent, that he or she is encouraging their children in ignorance and vice, to summon such parent before him; and, upon its being proved to his satisfaction, to bind out such children during their minority to some person of good moral character to be well supported, trained to good habits, and taught at least the rudiments of knowledge. Act. 206, S.L. 1953.

Section 1. Chapter 221 of the Revised Laws of Hawaii 1945 is hereby amended by adding new sections 10494, 10495 and 10496, to read as follows:

"Sec. 10494. *Actions which survive death of wrongdoer or other person liable.* All rights of action arising out of physical injury to the per-

son and rights of action arising out of the death of a person by wrongful act in favor of his dependents or in favor of persons toward whom the deceased occupied the relationship of husband, wife, parent or minor child, shall survive notwithstanding the death of the wrongdoer or any other person who may be liable for damages for such physical injury or death.

"Sec. 10495. *Death of defendant, no abatement of action.* In any case where the wrongdoer or other person who may be liable for damages for physical injury or death to the persons enumerated in section 10494 shall die after action shall have been instituted against him therefor, the action shall not abate, but may be continued against the executor or administrator of his estate in accordance with the provisions of chapter 204 of the Revised Laws of Hawaii 1945.

"Sec. 10496. *Death of wrongdoer or other person liable prior to suit, time for bringing action against estate.* In any case where the wrongdoer or other person who may be liable for damages for physical injury or death to the persons enumerated in section 10494 shall die before an action has been brought against him, such action may be brought against the executor or administrator of his estate; *provided,* however, that every such action shall be instituted within the time prescribed by law for filing of claims by creditors of the deceased in the probate proceedings and within two years of the act which caused

the physical injury or death, whichever shall be earlier, or be forever barred."

Act. 205, S.L. 1955.

Section 1. Section 10486 of the Revised Laws of Hawaii 1945 is hereby amended to read as follows:

"Sec. 10486. Death by wrongful act. When the death of a person shall be caused by the wrongful act, neglect or default of any person or corporation, the deceased's legal representative, or any of the persons hereinafter enumerated, may maintain an action against the person or corporation causing the death or against such person or corporation responsible for such death, on behalf of the persons hereinafter enumerated.

In any such action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including (a) loss of society, companionship, comfort, corsortium or protection, (b) loss of marital care, attention, advice or counsel, (c) loss of filial care or attention or (d) loss of parental care, training, guidance or education suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person. The jury or court sitting without jury shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damage recovered

under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased. If an action be brought pursuant to this section and a separate action brought pursuant to section 10497, such actions may be consolidated for trial on the motion of any interested party, and a separate verdict, report or decision may be rendered as to each right of action. Any action brought under this section shall be commenced within two years from the date of death of such injured person."

Section 2. Chapter 221 of the Revised Laws of Hawaii 1945 is hereby amended by adding a new section 10497 thereto to read as follows:

"Sec. 10497. Survival of actions. A cause of action arising out of a wrongful act, neglect or default, except actions for defamation and malicious prosecution, shall not abate by reason of the death of the injured person. Such action shall survive in favor of the legal representative of such person and any damage recovered shall form part of the estate of the deceased."

Section 3. Sections 10494, 10495 and 10496, as enacted by Act 206 of the Session Laws of Hawaii 1953, are hereby amended to read as follows:

"Sec. 10494. Actions which survive death of wrongdoer or other person liable. All rights of action arising out of physical injury to the person or out of the death of a person as provided by section 10486, shall survive, notwithstanding

the death of the wrongdoer or any other persons who may be liable for damages for such physical injury or death.

Sec. 10495. Death of defendant, no abatement of action. In any case where the wrongdoer or other person who may be liable for damages for physical injury or death as provided by section 10486 shall die after action shall have been instituted against him therefor, the action shall not abate, but may be continued against the legal representative of his estate in accordance of the provisions of chapter 204 of the Revised Laws of Hawaii 1945.

Sec. 10496. Death of wrongdoer or other person liable prior to suit, time for commencing action against the estate. In any case where the wrongdoer or other person who may be liable for damages for physical injury or death as provided in section 10486 shall die before an action has been brought against him, such action may be brought against the legal representative of his estate; provided, however, that every such action shall be instituted within the time prescribed by law for filing of claims by creditors of the deceased in the probate proceeding or within two years after the date of physical injury in all other cases, whichever shall be earlier."

Limitation of Actions

Personal Actions.

Sec. 10430, R.L.H. 1945.

Infancy, insanity, imprisonment. If any person entitled to bring any action in part 1 of this chapter specified (excepting actions against the high sheriff, sheriffs, or other officers) shall, at the time the cause of action accrued be, either,

1. Within the age of twenty years; or,

2. Insane; or,

3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than his natural life;

Such persons shall be at liberty to bring such actions within the respective times in said part 1 limited, after such disability is removed.